UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

EAST VALLEY GLENDORA HOSPITAL LLC, d/b/a GLENDORA COMMUNITY HOSPITAL, Employer and SEIU LOCAL 121RN, Petitioner	)	Case No. 31-RC-219293

OPPOSITION TO REQUEST FOR REVIEW BY THE EMPLOYER OF THE DECISION OF THE REGIONAL DIRECTOR ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

Dated: July 12, 2018

Jason Wojciechowski
General Counsel, SEIU Local 121RN
1040 Lincoln Avenue
Pasadena, CA 91103
Telephone: (626) 639-6168
WojciechowskiJ@seiu121RN.org
Attorney for Petitioner SEIU Local 121RN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

I. INTRODUCTION

On May 23, 2018, registered nurses at Glendora Community Hospital ("Employer") voted by a count of 77 to 8 to be represented by SEIU Local 121RN ("Union") for purposes of collective bargaining. Notwithstanding the lopsided result indicating a clear and strong employee interest in representation and bargaining, the Employer has begun the process of dragging the matter out. Step 1: file 29 objections, mostly regarding the prounion activities of charge nurses, who the Employer claims are supervisors. Step 2: make only a token effort at supporting those objections with a meaningful offer of proof, and instead file a 10-page document that is half legal argument, with the other half essentially a list of every nurse in the hospital followed by a regurgitation of the statement of the objections. Step 3: after the Regional Director correctly overrules the objections without a hearing because the offer of proof stated no actual facts, file a request for Board review, which includes, in its last paragraph, a bizarre attack on *Specialty Healthcare*.

There are no grounds for review here. This is a run-of-the-mill case in which the Regional Director's decision on objections is unimpeachable. For the reasons stated below, the Union respectfully requests that the Board expeditiously deny review.

II. SUMMARY OF OPPOSITION

The Employer has given six grounds for its request. For the following reasons, none of the six raise a substantial issue warranting review in this case:

1. No hearing was necessary on the Employer's objections to the conduct of the election because the Employer's offer of proof was only general and conclusory, and

therefore the "evidence" described there "would not constitute grounds for setting aside the election if introduced at a hearing . . . ." 29 C.F.R. § 102.69(c)(1)(i).

2. There is no cause for the Board to adopt a new test for supervisory status, particularly a test as amorphous and disconnected from the actual text of the Act as the standard proposed by the Employer. Moreover, this case provides a poor vehicle for reconsidering the test for supervisory status because the Employer has not presented any facts the Board can analyze under a new test.

3. The Employer's offer of proof is deficient regarding the allegedly coercive acts engaged in by the charge nurses, and therefore no hearing was necessary to determine whether any such acts occurred.

4. The Employer's offer of proof stated no facts on which the Regional Director could find that supervisors solicited authorization cards.

5. The Employer's offer of proof stated no facts on which the Regional Director could find that a supervisor participated as an observer in the election, and the Regional Director correctly found that the Employer failed to raise the issue at the appropriate time.

6. A request for review is not the appropriate forum for reconsideration of the Board's regulations regarding the conduct of elections.

III. ARGUMENT

A. Applicable Regulations and Legal Standards

The Board grants review of a Regional Director's decision "only where compelling reasons exist therefor," i.e. only on the grounds specified in the regulation:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or
(ii) A departure from,

officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d).

The Board's regulations require that a party objecting to the conduct of a representation election file, along with the objections, "a written offer of proof in the form described in §102.66(c) insofar as applicable . . . ." 29 C.F.R. § 102.69(a). The form referred to is "a written statement . . . *identifying each witness the party would call* to testify concerning the issue *and summarizing each witness's testimony*." 29 C.F.R. § 102.66(c) (emphasis added). Then, if "the regional director determines that the *evidence described* in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, . . . the regional director shall issue a decision disposing of the objections . . . ." 29 C.F.R. § 102.69(c)(1)(i) (emphasis added).

The Employer, as the party asserting supervisory status, has the burden of proof. *Oakwood Healthcare*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Ky. River Comm'y Care*, 532 U.S. 706, 710–12 (2001) (deferring to Board's allocation of the burden of proof)). The Employer must meet its burden with respect to each and every employee whom it asserts is a statutory supervisor. *Las Palmas Med. Ctr.*, 358 NLRB 460, 470 (2012) ("The burden must be

carried as to each particular individual who is alleged to be a supervisor."). Evidence that carries the burden cannot be general or conclusory:

> The Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status. Supervisory status is not proven where the record evidence "is in conflict or otherwise inconclusive." "[M]ere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority."

El Vocero de Puerto Rico, 365 NLRB No. 29, slip op. at 9 (Mar. 10, 2017) (citations omitted) (citing and quoting *Brusco Tug & Barge*, 359 NLRB 486, 491 (2012); *Dean & Deluca N.Y.*, 338 NLRB 1046, 1048 (2003); *Phelps Comm'y Med. Ctr.*, 295 NLRB 486, 490 (1989); *Alternate Concepts*, 358 NLRB 292, 294 (2012); *Avante at Wilson*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006)).

B. The Regional Director Performed as Much "Painstaking Analysis" of the Supervisory Issue as Could Be Expected Given the Lack of Facts in the Offer of Proof

The Employer's first argument is that the Regional Director failed to engaged in the kind of "painstaking analysis" called for by a 1999 guideline memo on charge nurse issues. The Union agrees that such an analysis is required, but reaches a different conclusion than does the Employer: It is precisely because of the need for a painstaking analysis of facts that the Employer's offer of proof must be far more substantial than the bare-bones two-page list of job duties of charge nurses provided here.

To take just one example, the Employer asserts in its offer of proof that charge nurses "[a]ssign[] support staff who work with nurses." (Request for Review, Attachment C, at 6.) Do all charge nurses perform this task? *See Las Palmas Med. Ctr.*, 358 NLRB at 470 ("The burden must be carried as to each particular individual who is alleged to be a

supervisor."). What factors does the charge nurse weigh in determining which support staff to assign to which tasks? *See Lynwood Manor*, 350 NLRB 489, 490 (2007) (finding employer "adduced little evidence regarding the factors weighed or balanced by nurses in determining the staffing needs"). What specific examples of assignment would the witnesses testify about? *See, e.g.*, *Loyalhanna Care Ctr.*, 352 NLRB 863, 864 (2008) (finding general assignment "testimony to be merely conclusory and hence insufficient to establish independent judgment"), adopted 355 NLRB 581 (2010).

The regulations require specific statements regarding the evidence to be adduced. The Employer is not entitled to a hearing on the basis of generalities and conclusions because generalities and conclusions would not be sufficient to carry its burden at the hearing. The Regional Director correctly applied the Board's regulations to the Employer's offer of proof when she overruled the objections without a hearing. The Regional Director did not depart from precedent and did not commit any error. Therefore, there is no ground for review of the Regional Director's decision not to conduct a hearing on the supervisory issue.

C. The Board Should Not Adopt Any New Test for Supervisory Status

The Employer urges the adoption of a new test for supervisory status, pointing to then-Member Miscimarra's dissent in *Buchanan Marine*, 363 NLRB No. 58 (Dec. 2, 2015). The majority in that case correctly stated why such a test should not be used:

> The sole question the Board must answer when making a supervisory determination is whether the party asserting supervisory status has proved that the person issuing commands possesses one or more of the indicia set forth in Section 2(11). Thus, we rely upon the text of the Act—specifically, the 12 enumerated types of 2(11) authority—and not other considerations, such as whether it is plausible to conclude that supervisory authority is vested in another individual. As the Third Circuit has observed, "[t]o do otherwise

> would be to usurp Congress's authority to promulgate the law." *NLRB* v. *Attleboro Associates, Ltd.*, 176 F.3d 154, 163 fn. 3 (3d Cir. 1999).

Id., slip op. at 2. The Board is charged with enforcing the Act, and the Act contains a comprehensive definition of "supervisor" that, most notably, does not contain any hint of the "whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute" test. *Id.*, slip op. at 5 (Miscimarra, dissenting).

Moreover, this would be a poor case for the Board to use as a vehicle to adopt a new test for supervisory status because there are not any facts in the record for the Board to analyze. The job duties summarized in the Employer's offer of proof would not give the Board any ability to determine "whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute" or any other new, extra-textual factor.

Therefore, this case does not present "compelling reasons for reconsideration of an important Board rule," so review is not warranted.

D. The Offer of Proof Contains No Facts Showing Interference with Employee Free Choice or Taint of the Election Process

The Employer's failure to provide any specific facts showing that the supposed supervisors are, in fact, supervisors is sufficient to overrule most of its objections and to deny review. The Employer also, though, failed to provide any specific facts tending to show interference with employee free choice. The offer of proof on this point essentially restates the objections, providing a list of 14 categories of alleged activities by eight charge nurses. Again, the lack of specificity is fatal. Did all eight listed charge nurses solicit employees to

sign petitions, or only a subset? What petitions? When did the solicitation occur? (Was it even during the critical period?) How many times did it happen? Who was around to see it?

The lack of detail is particularly important because, as the Regional Director pointed out, not every prounion action by every supervisor is sufficient to overturn an election. Pursuant to *Harborside Healthcare*, 343 NLRB 906 (2004), the Regional Director would be required to analyze what type of supervisor the employee in question is, the details of the conduct, and the extent of dissemination of the conduct. The Employer is therefore obligated to provide an offer of proof showing facts regarding which the Regional Director can engage in this analysis. The bullet-point approach used by the Employer here does not suffice.

Most particularly lacking is detail on the subjects of the pro-union conduct. The Regional Director correctly cited *Glen's Market*, 344 NLRB 294, 295 (2005), for the proposition that prounion supervisor conduct directed toward people over whom the supervisor has no authority is not objectionable. The Employer's charge nurses are presumably assigned to a specific unit (though the Employer does not discuss this issue in its offer of proof, either). Employees outside that unit who do not receive, for example, assignments or discipline from the supervisor in question would not be coerced by that supervisor asking the employee to sign a petition.

In this area as well, then, the Regional Director did not depart from precedent or otherwise commit prejudicial error, and there is no ground for Board review.

E. The Offer of Proof Contains No Facts Showing Supervisory Solicitation of Authorization Cards

The Employer argues that the Regional Director departed from Board precedent regarding supervisor solicitation of union authorization cards. The Regional Director applied precedent correctly, but, as above, had no facts to apply that precedent to because the Employer did not provide any. The Regional Director wrote:

> With respect to the solicitation of authorization cards by supervisors, the Board has held that direct supervisory solicitation has a tendency to interfere with an employees' [sic] freedom to choose to sign a card or not, given that solicitation places employees in a situation where they could reasonably be concerned about giving the "right" or "wrong" response to their supervisors. *Harborside Healthcare*, 343 NLRB at 911.

(Dec. on Objections at 5.) The Employer cites a number of cases with the same holding as *Harborside Healthcare*, while arguing that the Regional Director ignored precedent. What the Regional Director did is apply the precedent, including *Glen's Market*, to the facts stated, or not stated, in the offer of proof. The Regional Director found no offer from the Employer to prove that supervisors solicited *employees whom they supervise* to sign authorization cards. Absent such facts, there is no objectionable conduct, and the objection was properly overruled.

The Regional Director did not depart from precedent or commit prejudicial error regarding supervisory solicitation of authorization cards, so there is no ground for Board review of this point.

F. The Offer of Proof Contains No Facts Showing That the Election Should Be Overturned Due to a Supervisor Acting as an Observer

The Employer complains that the Regional Director erred in finding that "the Employer never raised the issue of supervisory status of the charge nurses at the pre-election conference." (Req. for Rev. at 19.)

First, this was an alternative rationale by the Regional Director. The main reason the objection regarding the election observer was overruled was because, at risk of repetition, the Employer did not provide any facts on which the Regional Director could determine that the observer was in fact a supervisor. Indeed, as the Regional Director noted, the Employer did not even identify who the alleged supervisor was.

Second, what the Regional Director actually found was that "the Employer [did] not include in its offer of proof an allegation that it raised the supervisory status *of the Union's observer* at the pre-election conference." (Dec. on Objections at 8 (emphasis added).) The Employer argues that it raised the supervisory status of charge nurses in its Statement of Position, and that charge nurses all voted subject to challenge. There is a missing step, however: How was the Board agent running the election supposed to know about, and therefore act on, the observer's supposed supervisory status? The Employer does not address the Regional Director's citation to *Liquid Transporters*, 336 NLRB 420 (2001), in which the Board held "that an employer must raise the alleged supervisory status of a union's election observer at the time of the preelection conference; otherwise, any such objection is precluded, and the employer may not raise the issue for the first time in its post-election objections." *Id.* at 420. Had the Employer raised the issue of the allegedly supervisory observer, the Board agent could have given the Union instruction that the Union

acted at its peril in doing so. Instead, the Employer sat on its hands. The rule that objections to observers must be made at the time of the election is longstanding and even applies to unions. *See Northrop Aircraft*, 106 NLRB 23, 26 (1953) (applying requirement to timely object regarding supervisory observers to the petitioning union where union had knowledge of the observers' status). The Employer has not explained, either factually or in its legal argument, why this rule does not apply here.

The Regional Director did not depart from precedent or commit prejudicial error regarding the supervisory status of an unknown election observer, so there is no ground for Board review on this point.

G. The Election Rules Cannot Be Reconsidered on a Request for Review

The Employer urges the Board to reconsider its regulations on representation case procedures. A request for review is not the procedure for that request. *AFGE Local 3090 v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("[A]n agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal . . . ."); *see also id.* at 760 (Scalia, concurring) ("[W]hile an adjudication can overrule an earlier adjudication, the Administrative Procedure Act clearly provides that a rule can only be repealed by rulemaking.") (citing 5 U.S.C. §§ 551(5) & 553).

The Employer also complains about *Specialty Healthcare*, 357 NLRB 934 (2011), which (a) would not have applied in this case because the petitioned-for unit in this acute-care hospital is the one set out in 29 C.F.R. section 103.30(a)(1); (b) would not have applied in this case because the Employer never challenged the appropriateness of the unit; and (c) was

overruled months before the petition in this case was filed, *see PCC Structurals*, 365 NLRB No. 160, slip op. at 1 (Dec. 15, 2017).

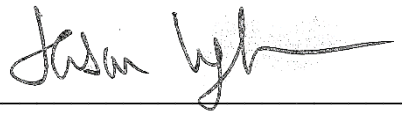
Therefore, the Employer's complaints about the election regulations and *Specialty Healthcare* do not provide a basis for Board review.

IV. CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board deny the Employer's request for review, as the Employer has failed to raise any substantial issues warranting review.

Dated: July 12, 2018

Respectfully Submitted,



Jason Wojciechowski
General Counsel, SEIU Local 121RN
1040 Lincoln Avenue
Pasadena, CA 91103
Telephone: (626) 639-6168
WojciechowskiJ@seiu121RN.org

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2018, I filed electronically with the National Labor Relations Board the following document:

OPPOSITION TO REQUEST FOR REVIEW BY THE EMPLOYER OF THE DECISION OF THE REGIONAL DIRECTOR ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

and copies were served by email as follows:

Richard S. Falcone, rfalcone@littler.com
David K. Broderick, dbroderick@littler.com
Littler Mendelson, P.C.
Attorneys for Employer East Valley Glendora Hospital LLC d/b/a Glendora Community Hospital

Mori Rubin, Mori.Rubin@nlrb.gov
Tom Chang, Tom.Chang@nlrb.gov
Sarah Ingebritsen, Sarah.Ingebritsen@nlrb.gov
National Labor Relations Board, Region 31

Jason Wojciechowski